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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO PEREZ ROSAS,

Defendant and Appellant.

B205899

(Los Angeles County
Superior Ct. No. BA316771)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Johnson, Judge. Affirmed.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Gerardo Perez Rosas of second degree murder. On appeal, he challenges the constitutionality of Penal Code section 22¹ and CALCRIM No. 625. We affirm.

FACTS

Rosas spent the afternoon and evening of September 16, 2006, drinking beer with Mario Salvador and Juan Morelos at two pallet yards. Morelos' 18-year-old nephew was also present, but not drinking. Morelos became combative at the second yard, throwing bottles at a stranger and expressing anger at Salvador's treatment of the nephew. An employee of the pallet yard who lived nearby came to investigate the noise. He saw the nephew drive away and Morelos challenge Salvador to a fight. Rosas, however, started fighting with Morelos. Rosas pushed Morelos against a truck; and the fight appeared to end as the combatants shook hands and drank some more.

Within 15 minutes, the fight between Rosas and Morelos resumed. When Morelos pushed Rosas down, Rosas picked up a metal rod and threatened Morelos. The yard employee took the rod away from Rosas, and Morelos began fighting with Salvador. Salvador knocked Morelos down and once again the fighting seemed to subside. The yard employee left. He would testify at trial that Rosas and Morelos were both drunk.

A short time later, nearby residents found Morelos on fire in the pallet yard. He had been badly beaten, doused with gasoline, and set afire. The next morning, Rosas told Salvador's son he had beaten "the guy," thrown "diesel" on him, and set him on fire. Morelos died two days later.

The jury convicted Rosas of second degree murder.² The court sentenced him to 15 years to life in prison.

¹ All further references are to the Penal Code.

² Salvador was also charged, but entered into a plea agreement before trial.

DISCUSSION

Rosas presented evidence of his voluntary intoxication to the jury. Pursuant to section 22,³ the jury was instructed as follows: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or the defendant acted with deliberation and premeditation. [¶] A person is voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose.” (CALCRIM No. 625.) Rosas contends Penal Code section 22 violated due process and equal protection rights, as well as his constitutional right to present a defense and confront witnesses.

Rosas did not raise these issues in the trial court, however, and they are waived. Constitutional claims and objections must generally be raised in the trial court in order to preserve them for appeal, and we find no exception to that rule here. (*People v. Waidla* (2000) 22 Cal.4th 690, 718, fn. 4.) Moreover, while there was undisputed evidence of his intoxication at the time of the killing, Rosas did not attempt to introduce any testimony regarding the effect of his voluntary intoxication on his mental state.

In any event, Rosas’ due process claim was rejected by the Supreme Court in *People v. Atkins* (2001) 25 Cal.4th 76, 93.⁴ More recently, *People v. Timms* (2007) 151

³ Penal Code section 22 provides in part: “(a) . . . Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or when charged with murder, whether the defendant premeditated, deliberated, or, harbored express malice aforethought.”

⁴ Rosas presents no arguments concerning CALCRIM No. 625 independent of the due process challenge.

Cal.App.4th 1292 addressed and rejected due process and equal protection challenges to section 22. We would also reject these claims on the merits.

Rosas' assertion that section 22 infringed upon his right to present a defense is simply an aspect of his due process and equal protection claims and has no independent significance. Nonetheless, as mentioned above, Rosas never attempted to introduce evidence that his intoxication affected his mental state. Rosas failed to brief the contention that section 22 violated his right to confront witnesses, and he has waived this argument. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11.)

DISPOSITION

The judgment is affirmed.
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DUNNING, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.